

Dear Allottees,

Pursuant to the publication in newspapers (dated. 25.09.2019) your IRP had received various claims from time to time which are statutorily required to be verified and collated by the IRP. While doing the verification and collation of the aforesaid claims the IRP applied the various provisions of Insolvency and Bankruptcy Code'2016 ("IBC'2016") & regulations made there under and laid certain parameters on the basis of which IRP has verified and collated the claims.

In order to maintain transparency, the IRP is communicating the parameters which were applied for verification and collation of your claims.

In order to appreciate and understand the parameters the following provision of IBC'2016 & regulations made thereunder are reproduced herein below:

Section 5(8) "*financial debt*" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money *and includes*—

- a) money borrowed against the payment of interest;
- b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;
- c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- e) receivables sold or discounted other than any receivables sold on non-recourse basis
- f) **any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;**

Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

Regulation 2(aa)

“class of creditors” means a class with at least ten financial creditors under clause (b) of sub-section (6A) of section 21 and the expression, “creditors in a class” shall be construed accordingly.

Regulation 16A Authorised Representative

(7) The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of **eight per cent per annum unless a different rate has been agreed to between the parties.**

On conjoint reading of explanation to 5(8)(f) with regulation 2(aa) with regulation 16A of IBBI(CIRP) Regulations’2016 it is clear that in the absence of any agreement between the financial creditor and corporate debtor, the financial creditor in class will get the 8% interest on their debt as time value of money.

On perusal of Form CAs filed by the financial creditors it is revealed that the creditors claimed the interest rate @18%. In support to their claim qua the interest the claimants relied on the builder buyer agreement and the decision of Hon’ble NCDRC in the matter of ***Swaran Talwar & others Vs M/s. Unitech Limited.***

As per clause 14 of the Builder Buyer Agreement, if the company is unable to give possession within the agreed time period the allottee shall be entitled for **compensation @Rs.10/sq.ft./ month** of the built-up area of the apartment booked by the allottee. The tone and tonner of the aforesaid clause clearly shown that the Rs.10/sq.ft./ month of the built-up area is a compensation to the allottee and is not a time value of money to the debt due to the company. Moreover, the Hon’ble NCDRC in the matter of Satish Kumar Pandey & Anr. Vs M/s. Unitech Limited in C.C. No.427 of 2014 held that charging the delay from the buyer @18% and giving the buyer the compensation @2%-3% amounts to unfair trade practice.

Further on perusal of the decision of Hon’ble NCDRC in the matter of ***Swaran Talwar & others Vs M/s. Unitech Limited,*** Hon’ble NCDRC directed the opposite party to pay the interest @18% as a **compensation** after considering the appreciation of prices of land, increase in cost of construction, mental agony, harassment etc.

In this regard it is submitted that either the BBA or decision of Hon’ble NCDRC talks about the “COMPENSATION”. Whereas the provisions of IBC’2016 provides

for the time value of money and IRP has to verify and collate the claims as per the provisions of the IBC'2016.

Hence in the absence of any agreement between the allottee and Corporate Debtor, the IRP has considered the interest @8%. However, the exceptions to the @8% have been carved out in the following cases :

Exception 1: Allottees of unit in Tower-K

The Tower-K was abandoned some where in 1st quarter of 2016 and the corporate debtor substituted the rate of interest @12% instead of 6% in clause 15 of BBA. Since, the allottees of abandoned Tower – K are more than 10 in number and their rate of interest was fixed @12% by the Corporate Debtor. Hence, their claim is verified @12% interest instead of 8% as contemplated by regulation 16A(7). It is also made clear that creditors of Tower-K are no more allottees to the real estate project of the corporate debtor and are creditors in class in terms of Section 5(8)(f).

The IRP will form the class of these creditors accordingly.

Exception 2 : Allottees having exercised the buy back option given by the Corporate Debtor

It came to the knowledge of the IRP that Corporate Debtor has entered into MOU with certain creditors wherein the buy back option was given to them.

If the creditor did not exercise the buy-back option, their rate of interest will be determined as per regulation 16A (7) because their allotment is in force / existence and liability to pay buy back amount is not crystallised.

In case the creditor has exercised the buy-back option, then the rate of interest will be determined after perusing the MOUs provided such rate of interest shall not hit by section 50 the IBC'2016.

The IRP is in process of identifying such claims and will do the verification and collation accordingly and will form the class of these creditors if need arises.

Exception 3 : Allottees who have approached UPRERA/ Any other court of competent jurisdiction and having order in their favour

It came to the knowledge of the IRP that some of the allottees had filed the cases in UP RERA and have orders in their favour wherein Hon'ble UP RERA directed the Corporate Debtor to **refund** the debt amount **along with specified rate of interest, say MCLR+1%.**

In these cases, the IRP will examine the claims case to case basis and will take the rate of interest as directed by Hon'ble UP RERA, since the order of Hon'ble UP RERA is binding on the Corporate Debtor.

The IRP is in process of identifying such claims and will do the verification and collation accordingly and will form the class of these creditors if need arises.

It is further made clear that your IRP is in the process of identifying further exceptions to the rate @ 8% and will verify the claims after accordingly. In future, on finding the appropriate exception will add the exception.

It is also made clear that your IRP has already identified the claims qua to exception-1 and whereas the IRP may request the claimants of exception 2 and 3 to assist him to identify their claims. For this IRP will issue another communication shortly.

Your's Faithfully

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